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SUPREME COURT OF FLORIDA

No. 58,192

STATE OF FLORIDA, Petitioner,

v.

CONSTANTINO CASAL and
OMAR GARCIA, Respondents.

[January 14, 1982]

BOYD, J.

This cause is before the Court on petition for certiorari to review the decision in Casal v. State, 375 So.2d 1077 (Fla. 3d DCA 1979). We have jurisdiction by virtue of conflict with Hill v. State, 238 So.2d 608 (Fla. 1970) and Miranda v. State, 354 So.2d 411 (Fla. 3d DCA), cert. denied, 364 So.2d 888 (Fla. 1978). Art. V, § 3(b) (3), Fla. Const. (1972).

While patrolling the Atlantic side of the Florida Keys at night, Officers Walker and Soli of the Florida Marine Patrol saw a fishing vessel then being

operated by the respondents. Although the Marine Patrol had received several complaints from local fishermen that their traps were being raided, the officers initially had no suspicion that the operators of the vessel were engaged in illegal activity. Nevertheless, they pulled alongside the vessel and asked the captain to cut his engines. They then asked to see the boat's registration certificate which is legally required to be on board. See § 371.051(5), Fla. Stat. (1977). The captain Omar Garcia produced a tax receipt and some other documents but could not locate the registration certificate. Because the boats were banging alongside each other, Officer Soli asked permission to board the vessel. The respondents assisted her on board.

Upon boarding Officer Soli accompanied the respondents to the cabin to

help look for the registration certificate. She testified that the respondents seemed agitated and apprehensive insofar as they were looking at each other a lot. She then asked to look in their icebox. After being told that would be fine she opened the icebox and saw some rotten food but no ice. This seemed strange to her since the captain had earlier said that they were on their way to Cay Sal to go fishing. She reported this finding to Officer Walker who had maneuvered the Marine Patrol vessel a few feet away to keep it from bumping into respondents' vessel. Officer Soli then asked to look in the forward hatch. Captain Garcia asked if she had a search warrant. Overhearing this exchange Officer Walker told Garcia that they did not need a search warrant since they were not conducting a search and that he was under arrest for

not having a boat registration certificate on board. Garcia then said there was no need to go further and that the boat was loaded with grass. Officer Walker called respondents over to the side of the boat and after advising them of their Miranda rights asked them to confirm what was just said by opening the front hatch for Officer Soli's inspection. When they did so she discovered several bales of marijuana.

Respondents were taken into custody and charged with violating sections 893.03 (1) (c) and 893.13(1) (a), Florida Statutes (1977). Before trial they moved to suppress the evidence on the basis that the search was illegal since the officers had neither probable cause to stop the vessel nor, having stopped the vessel, probable cause to search it. The trial court denied the motion, and after trial

respondents were convicted. On appeal the district court reversed on the basis of the United States Supreme Court decision in Delaware v. Prouse, 440 U.S. 648 (1979), which had been handed down in the interim. In that case, after balancing the state's interest in promoting public safety on its roads against the citizens' interest to be free from government intrusion, the Supreme Court held that a police officer's completely random stop of an automobile to check the driver's license and car registration was an unconstitutional seizure under the Fourth Amendment. The district court reasoned that the Marine Patrol's stopping respondents' vessel was likewise unconstitutional since there was "no basis for distinguishing between automobiles and boats in applying the Fourth Amendment's proscription of unreasonable searches and

and seizures." 375 So.2d at 1078. Since we find there is a distinction substantial enough to tip the balance in favor of the state's legitimate interest, we disapprove that portion of the district court's opinion. Since we conclude that there was no probable cause to search the boat, however, we approve the district court's decision that the evidence should have been suppressed.

First we shall consider what are the state's interests. One main interest is promoting maritime safety. All motorboats must contain certain safety equipment and lighting devices. § 371.57, Fla. Stat. (1977). In Prouse, the Supreme Court stated that the state of Delaware had several alternative methods of promoting public highway safety, including annual automobile inspections and frequent enforcement of traffic violations. These

methods are not available to the Florida Marine Patrol. The main concern here that motorboats be safely equipped cannot be furthered by requiring periodic safety inspections. Unlike automobiles, the items of safety equipment required to be on boats, such as life jackets and fire extinguishers, are easily detachable. A periodic inspection could not insure that such equipment would be on board when the boat was being operated. Nor are such safety violations observable and therefore subject to as frequent enforcement as automobile violations.

The state also has a legitimate interest in regulating fishing within the state's waters. Hill v. State, 238 So.2d 608 (Fla. 1970). In Hill this Court held that requiring an applicant for a shrimping permit to give blanket permission to conservation officers to board his vessel

at any time with or without cause did not violate the applicant's right to be free from unreasonable search or seizure under the state and federal constitutions. A distinction was made between boarding and searching or seizing. This Court found that permission to board was for the limited purpose of ascertaining whether the permit was being carried on board and that any further search or inspection could only be conducted if there were probable cause that a law was being violated. See also Tingley v. Brown, 380 So.2d 1289 (Fla. 1980). The decision suggests that boarding a vessel for the limited purpose of checking for a permit does not constitute a search or seizure.

Chapter 370, Florida Statutes (1977), regulates the taking of saltwater fish and the sizes and quantities of fish that may be taken. Its purpose is to conserve

Florida's marine life which is valuable to the economy, Hill v. State, and to protect certain species from extinction. See §§ 370.114 and 370.12, Fla. Stat. (1977). Requiring boats which may be carrying such marine life to stop for inspection of valid permits is akin to requiring trucks capable of carrying agricultural products to stop at agricultural inspection stations. See Gluesenkamp v. State, 391 So.2d 192 (Fla. 1980); Stephenson v. Department of Agriculture and Consumer Services, 342 So.2d 60 (Fla. 1976).

Now we must consider the citizen's interest in freedom from this type of governmental intrusion. A citizen's expectation of privacy is diminished when participating in specific types of regulated activity. See United States v. Biswell, 406 U.S. 311 (1972) (operating

firearms store); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (operating liquor store). In Prouse the Supreme Court found that government regulation of automobiles did not reduce a person's expectation of privacy.

> Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day travelling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in travelling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed.

440 U.S. at 662-63.

The same does not hold true for motorboat travel. It is not a pervasive or necessary mode of transportation for most people. There is not as great a sense of security and privacy when travelling in a boat as when travelling in an automobile.

Thus subjecting boats to random spot checks for fishing permits or registration certificates does not seriously circumscribe the Fourth Amendment.

Finally, the Supreme Court in Prouse explicitly stated that its holding did not preclude the state of Delaware from developing a system of spot checks. The Court went so far as to suggest the possibility of setting up roadblocks where all traffic is stopped. 440 U.S. at 663. Cf. United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (checkpoint stops and questioning may be made in absence of any individualized suspicion).

We note that this less intrusive alternative is not available to the marine patrol. Boat travel is not limited by fixed roadways. Unlike an automobile, a boat at sea can travel in any direction. Even in harbors where there are channels

which boats must follow, it would be impossible to establish a checkpoint on the water since boats cannot come to a complete stop and line up behind each other on the water as cars can on roads.

In sum we find that the state's interest in random stopping and brief detention of motorboats for the limited purpose of checking fishing permits, registration certificates and safety equipment outweighs a person's interest in being completely free from such limited intrusion. In light of the absence of less restrictive alternatives which would accomplish the state's goals, spot checks of motorboats are not unreasonable under the Fourth Amendment. The district court erred in holding that State marine officers must have probable cause to stop a vessel for the limited purposes discussed above.

We next consider an issue the district

court did not need to reach. That is the question whether the marine patrol officers, having lawfully stopped respondents' vessel, had probable cause to search it. As we have held earlier, after the initial stopping and boarding a vessel the marine patrol must have probable cause before conducting any further search or inspection. Tingley v. Brown; Hill v. State. With respect to safety inspections the legislature has decided that not even the initial boarding may be conducted without consent or probable cause. § 371.58, Fla. Stat. (1977).[1]

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[1] 371.58 Safety inspections; qualified.--No officer shall board any vessel to make a safety inspection if the owner or operator is not aboard. When the owner or operator is aboard an officer may board a vessel with consent or when he has probable cause or knowledge to believe that a violation of a provision of this part has occured or is occurring.

In this case consent was freely given to board the vessel and to look in the ice-box.

However, respondents did not consent to any further search, as was clearly indicated when they asked Officer Soli if she had a search warrant. Villari v. State, 372 So.2d 522 (Fla. 1st DCA 1979). Respondents' subsequently opening the forward hatch for Officer Soli did not constitute consent since they were told that a search warrant was not needed. See Taylor v. State, 355 So.2d 180 (Fla. 3d DCA), cert. denied, 361 So.2d 835 (Fla. 1978).

Without consent, the officers were precluded from further searching the vessel unless they had probable cause to believe that a crime was being or was about to be committed. Tingley v. Brown. Probable cause cannot be based on mere

suspicion. Bailey v. State, 319 So.2d 22 (Fla. 1975). There must be facts showing a probability of criminal activity. State v. Smith, 233 So.2d 396 (Fla. 1970). In this case the facts were insufficient to show that respondents were probably committing or about to commit a crime. That respondents could not produce a registration certificate and that, although they said they were going to the Bahamas, their icebox did not contain ice may have been suspicious circumstances but did not constitute probable cause. Since the officers lacked probable cause, their search of the vessel was unreasonable and the evidence they obtained should have been suppressed.

We disapprove the district court's decision insofar as it held that the initial stop was unreasonable and required probable cause. However, since we hold

that the subsequent search was unreasonable because it was not based on probable cause, we approve the district court's reversal of the conviction. In accordance with the mandate of the district court of appeal, this cause is remanded to the circuit court with directions to discharge the defendants.

It is so ordered.

SUNDBERG, C.J., ADKINS and OVERTON, JJ., Concur
ALDERMAN, J., Concurs in part and dissents in part with an opinion, in which McDONALD, J., Concurs

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

ALDERMAN, J., concurring in part, dissenting in part.

I agree with the majority's holding that the stopping of the motorboat was not unreasonable under the fourth amendment. The State's interest in the brief stopping for the purpose of checking permits, registration certificates, and safety equipment outweighs defendants' interest in being free from this limited intrusion. The district court was therefore in error in holding that the state marine officers must have probable cause to stop a vessel for these limited purposes.

Unlike the majority, however, I would also hold that the search of the front hold of the boat was not unreasonable under the fourth amendment. Two distinct and well-established exceptions to the warrant requirement, the "Carroll" exception and the search-incident-to-arrest exception, apply here.

In Carroll v. United States, 267 U.S. 132 (1925), the Supreme Court recognized that the warrantless search of a motorboat or ship based upon probable cause may be a reasonable search under the fourth amendment because of the exigent circumstances arising from the movability of the vessel. In that case, the Supreme Court distinguished between search of a fixed structure in respect of which a warrant may be obtained and search of a ship, motorboat, wagon, or automobile for contraband "where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." 267 U.S. at 153. Futhermore, the fact that the officers may be able to secure a vessel does not derogate their authority to search it under the Carroll exception. Chambers v. Maroney, 399 U.S. 42 (1970).

In the present case, I believe that probable cause and exigency exist and that the Carroll exception is applicable. Captain Garcia, shortly after having been arrested for failure to have a registration certificate on board, without any prompting by anyone or without any questions being asked, told the officers that the boat was loaded with marijuana. At that time the officers clearly had probable cause to believe that the defendants' boat was carrying marijuana. The boat itself was fully mobile, and the question of whether it could have been secured is irrelevant. Chambers v. Maroney.

Completely independent of the Carroll exception, I believe the search of the hold was within the constitutionally permissible scope of the search-incident-to-arrest exception. In Chimel v. California, 395 U.S. 752 (1969), the Supreme Court of

the United States held that where there has been a lawful custodial arrest, the officers are justified in making a contemporaneous warrantless search of the arrested person in order to remove any weapons that the arrestee may seek to use in order to effect his escape or resist arrest and in order to seize any evidence on the arrestee's person to prevent its concealment or destruction. The court also held proper a contemporaneous search of the area immediately surrounding the arrestee for the same purposes. These searches may be made whether or not there is probable cause to believe that the person arrested may have a weapon or is about to destroy the evidence since the potential dangers lurking in all custodial arrests make warrantless searches of items within the "immediate control" area reasonable. The arresting officer is not required to

calculate the probability that weapons or destructable evidence may be involved. United States v. Chadwick, 433 U.S. 1 (1977); United States v. Robinson, 414 U.S. 218 (1973). The fact of lawful arrest, alone, authorizes the warrantless search. Michigan v. DeFellippo, 443 U.S. 31 (1979).

Acknowledging the difficulty courts have encountered in respect to the proper scope of what is meant by the area within the immediate controal of an arrestee, particularly in automobile cases, the Supreme Court of the United States in New York v. Belton, 101 S.Ct. 917 (1981), held that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, incident to the arrest, contemporaneously search the passenger compartment of that automobile. This includes, explained the court, a search of

any containers found within the passenger compartment whether the container is opened or closed. In Belton, the occupants of the car had been ordered to get out of the car and had been placed under arrest prior to the officer's searching of the passenger compartment.

In the present case, there is no question that the search was conducted immediately upon arrest of the defendants, and the hold of the boat was easily accessible to the defendants. It is not inconceivable that the defendants may have had weapons hidden in the hold or that armed accomplices could have been hiding there, merely waiting an opportunity to surprise the officers and to thwart the arrest of defendants. Likewise, it is not inconceivable that defendants could have quickly reached the hold and attempted to destroy the evidence by throwing it overboard.

Accordingly, I would hold that the stop and search and seizure were constitutional, and therefore I would quash the decision of the district court.

McDONALD, J., Concurs

A Petition for Writ of Certiorari to the District Court of Appeal, Third District - Case No. 78-2129

Jim Smith, Attorney General and Anthony C. Musto, Assistant Attorney General, Miami, Florida,

for Petitioner

Arthur F. McCormick, South Miami, Florida,

for Respondents

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF
APPEAL OF FLORIDA, THIRD
DISTRICT

JULY TERM, A.D. 1979

CONSTANTINO CASAL and OMAR
GARCIA, Appellants,

vs. CASE NO. 78-2129

THE STATE OF FLORIDA,
Appellee.

Opinion filed August 14, 1979.
An Appeal from the Circuit Court
for Monroe County, Bill G. Chappell, Judge.
Arthur F. McCormick, for appellants.
Jim Smith, Attorney General and
Susan Minor, Assistant Attorney General,
for appellee.

Before Hendry, Kehoe and Schwartz, JJ.

SCHWARTZ, Judge.

The defendants appeal their convictions for possession of marijuana. The cannabis was found aboard a vessel, occupied by the defendants, which had been stopped by Florida Marine Patrol officers while it was under way in the Atlantic off

Monroe County. The officers acknowledged that they had no suspicion, "founded" or otherwise,[1] that those aboard the boat were engaged in any unlawful activity; the stated basis of the stop and subsequent boarding of the vessel was instead simply to make a check of the vessel's registration papers. Both when the incident occurred and when the case, including the defendants' motion to suppress the marijuana, was heard below, the prevailing law was that such a stop was constitutionally permissible. See Hill v. State, 238 So.2d 608 (Fla. 1970). Indeed, this court specifically so held in Miranda v. State, 354 So.2d 411 (Fla. 3d DCA 1978), cert. denied, 364 So.2d 888 (Fla. 1978), which applied the cases permitting "law enforce-

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[1] See, e.g., State v. Stevens, 354 So.2d 1244 (Fla. 4th DCA 1978)

ment officers to stop an automobile for the purpose of making a driver's license or car registration check." 354 So.2d at 413-414.

During the pendency of this appeal, however, the Supreme Court of the United States definitively ruled to the contrary. In Delaware v. Prouse, ____U.S.____, 59 L.Ed.2d 660, 673, 99 S.Ct. 1392 (1979), it was held:

> [E]xcept in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment.

As the Hill and Miranda cases themselves demonstrate, there is no basis for distin-

guishing between automobiles and boats in applying the Fourth Amendment's proscription of unreasonable searches and seizures. Since this is true, and since none of the exceptions stated in the Prouse decision are applicable here,[2] we conclude, as did the court in Keenan v. State, ____So.2d____(Fla. 1st DCA 1979) (Case no. LL-156, opinion filed, July 12, 1979), that Prouse requires the conclusions that the stop was improper, and that the motion

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[2]Compare Taylor v. State, 355 So.2d 180 (Fla. 3d DCA 1978), cert. denied, 361 So.2d 834 (Fla. 1978), where an expired commercial registration certificate was visible to the Marine Patrol officer who "stopped" the boat.

to suppress the contraband which was seized as a result of the stop should therefore have been granted.[3]

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[3]This result is not contrary to Michigan v. DeFillippo, 47 U.S.L.W. 4805 (June 25, 1979) which upheld the seizure of contraband incident to an arrest for the violation of an ordinance declared unconstitutional only afterwards. Unlike Hill v. State, supra, there seems to be no Florida statute, as opposed to existing judicial interpretations of the effect of the Fourth Amendment, which purports to authorize the unconstitutional practice of stopping a vessel merely to make a random check of its registration certificate. Compare the provision involved in Hill, Section 370.021(5), Fla.Stat. (1967) (permitting stop to ascertain whether shrimping permit was on board) with Section 371.051(5), Fla. Stat. (1975) (requiring that registration certificate be available for inspection but giving no authority to stop). Even if there were such a statute, it would clearly be invalidated by Prouse. The DeFillippo opinion distinguishes such a situation from the DeFillippo case itself, stating at 47 U.S.L.W. 4807-4808:

> We have held that the exclusionary rule required suppression of evidence obtained in searches carried out pursuant to statutes, not previously declared

(Footnote 3 cont'd)

unconstitutional, which purported to authorize the searches in question without probable cause and without a valid warrant. See, e.g., Torres v. Puerto Rico, ___U.S.___(1979); Almeida-Sanches v. United States, 413 U.S. 266 (1973); Sibron v. New York, 392 U.S. 40 (1968); Berger v. New York, 388 U.S. 41 (1967). Our holding today is not inconsistent with these decisions; the statutes involved in those cases bore a different relationship to the challenged searches than did the Detroit ordinance to respondent's arrest and search.

Those decisions involved statutes which, by their own terms, authorized searches under circumstances which did not satisfy the traditional warrant and probable cause requirements of the Fourth Amendment.

* * *

In contrast, the ordinance here declared it a misdemeanor for one stopped for 'investigation' to 'refuse to identify himself'; it did not directly authorize the arrest or search. Once respondent refused to identify himself as the presumptively valid ordinance required,

(Footnote 3 cont'd)

> the officer had probable cause to believe respondent was committing an offense in his presence and Michigan's general arrest statute ... authorized the arrest of respondent, independent of the ordinance. The search which followed was valid because it was incidental to the arrest. The ordinance is relevant to the validity of that arrest and search only as it pertains to the 'facts and circumstances' we hold constituted probable cause for arrest.

The judgments under review are reversed and the cause remanded with directions to discharge the defendants.

Reversed and remanded.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

JANUARY TERM, A.D. 1982

CONSTANTINO CASAL and
OMAR GARCIA,
Appellants,

vs. CASE NO. 78-2129

THE STATE OF FLORIDA,
Appellee.

Opinion filed April 7, 1982.
An Appeal from the Circuit Court for Monroe County, Bill G. Chappell, Judge.
Arthur F. McCormick, for appellants.
Jim Smith, Attorney General and Anthony Musto, Assistant Attorney General, for appellee.

Before HUBBART, C.J., and HENDRY and SCHWARTZ, JJ.

ORDER ON MANDATE

PER CURIAM.

WHEREAS, the judgement of this court was entered on August 14, 1979 (375 So.2d 1077), reversing the final judgments and sentence of the Circuit Court of Dade County, Florida, in the above styled cause; and

WHEREAS, on review of this court's

judgment, the Supreme Court of Florida, by its opinion and judgment dated January 14, 1982, now lodged in this court, disapproved in part this court's judgment;

NOW, THEREFORE, it is ordered that the mandate of this court heretofore issued in this cause on November 27, 1979, is withdrawn, the opinion of this court filed August 14, 1979, is amended in accordance with the said opinion and judgment of the Supreme Court of Florida. The judgments and sentence of the trial court are reversed and the cause remanded with directions to discharge the defendants. Costs allowed shall be taxed in the Circuit Court. Fla.R.App.P. 9.400(a)

(THE MANDATE IN THE ABOVE STYLED CAUSE HAS TODAY BEEN ISSUED AND MAILED TO THE CLERK OF THE CIRCUIT COURT IN AND FOR MONROE COUNTY, FLORIDA)

MANDATE

SUPREME COURT OF FLORIDA

To the Honorable, the Judges of the District Court of Appeal, Third District,

WHEREAS, in that certain cause filed in this Court styled: STATE OF FLORIDA v. CONSTANTINO CASAL and OMAR GARCIA

Case No. 58,192

Your Case No. 78-2129

The attached opinion was rendered on January 14, 1982, YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rule of this Court and the laws of the State of Florida.

WITNESS the Honorable Alan C. Sundberg, Chief Justice of the Supreme Court of Florida and the Seal of said Court at Tallahassee, the Capital, on this 15th day of March, 1982.

s/
Clerk of the Supreme Court of Florida

SUPREME COURT OF FLORIDA

MONDAY, MARCH 15, 1982

STATE OF FLORIDA,	*	
	*	
Petitioner,	*	
	*	CASE NO. 58,192
v.	*	
	*	District Court of
CONSTANTINO CASAL and	*	Appeal, 3d District
OMAR GARCIA,	*	78-2129
	*	
Respondents.	*	

* * * * * * * * * * * * *

Upon consideration of the Motion for Rehearing filed in the above cause by the attorney for Petitioner, and response thereto,

IT IS ORDERED that said Motion be and the same is hereby denied.

SUNDBERT, C. J., ADKINS, BOYD and OVERTON, JJ., concur

ALDERMAN and McDONALD, JJ., dissent

TC

cc: Hon. Louis J. Spallone, Clerk
Hon. Bill G. Chappell, Judge
A True Copy Hon. Ralph W. White, Clerk

TEST: Arthur F. McCormick, Esq.
Anthony C. Musto, Esq.

Sid J. White
Clerk, Supreme Court